American Express Bank Ltd v Mohamed Toufic Al-Ozeir & Anor

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-225-1994
PEH SWEE CHIN, WAN YAHYA AND MOHAMED DZAIDDIN FCJJ
12 DECEMBER 1994

Civil Procedure *— Jurisdiction — Contract — Clause containing choice of law and submission to courts of Singapore — Effect — Whether Malaysian courts could entertain claim*

Civil Procedure *— Jurisdiction — Forum non conveniens — Tort committed within jurisdiction — Whether court has discretion not to hear case if court in another jurisdiction is more appropriate forum — Whether unjust to confine plaintiff to remedies elsewhere — Burden of proving appropriateness of forum*

Words and Phrases *— 'Conveniens' — Forum non conveniens*

The appellant, an international banking corporation with a branch in Singapore, and the respondents entered into two agreements in respect of foreign exchange transactions whereby the appellant was to assist the respondents in their dealings which were carried out in Singapore, London and New York. The agreements contained clauses whereby the parties had agreed to be bound by the laws of Singapore and be subject to its courts. The respondents obtained leave of court to issue and serve a notice of writ out of jurisdiction alleging that the appellant had acted in fraudulent breach of a fiduciary duty owed to them by giving them false and misleading information.and claimed special damages of US$10.55m, general damages of US$10m and costs. The appellant applied to discharge the order granting leave to issue and serve the notice of writ out of jurisdiction and to set aside the writ and service thereof on the grounds, inter alia, that: (i) the Malaysian courts had no jurisdiction over the matter as the alleged torts had been committed outside the jurisdiction; (ii) it was expressly agreed in the agreements that all disputes were to be determined in accordance with the laws of Singapore and by its courts; and (iii) Singapore was the more proper forum as all the witnesses were from there or elsewhere but not from Malaysia. The application was dismissed (see [1994] 2 MLJ 687) and the appellant has appealed.

Held, allowing the appeal:

(1) The trial judge had correctly held that the tort of fraudulent and negligent misrepresentation when made by the telephone or telex was committed at the place where the message was received and acted on, and not the place from which it was sent. Therefore, the High Court had jurisdiction to entertain the claim.

(2) However, even if there is such jurisdiction, at common law, the court has still the discretion to decide whether to deal with it on

A the doctrine of forum non conveniens, which means the suitability or appropriateness of the relevant jurisdiction and not convenience.

(3) Where a defendant applies for a stay of proceedings, he must satisfy the court that some other forum is more appropriate, but where a plaintiff applies for leave to issue and serve a notice of
B writ out of jurisdiction under O 11 r 1 of the Rules of the High Court 1980 ('the RHC'), then the plaintiff must satisfy the court that the Malaysian court is the most appropriate forum to try the action. In the instant case, the burden lay on the respondents to show that Malaysia was the most appropriate forum. In any event, it is obligatory for the court to consider whether it would
C be unjust to a plaintiff to confine him to remedies elsewhere.

(4) The Malaysian court was not precluded from exercising its discretion whether to hear the case merely because of the foreign jurisdiction clauses specifying the laws and courts of Singapore. However, those clauses militated against the respondents'
D argument that the Malaysian court was the most appropriate forum. Furthermore, all the respondents' securities were deposited with the appellant in Singapore and London and the main witnesses for the appellants were residents outside Malaysia. The respondents had, therefore, failed to satisfy the court that it was
E the most appropriate forum to try the action.

Obiter:

Had there been no choice of the Singapore courts in the clauses, but only the choice of Singapore law, that would not have amounted to a submission to the jurisdiction of the Singapore courts.

F

[Bahasa Malaysia summary

Perayu, sebuah korporat bank antarabangsa yang mempunyai sebuah cawangan di Singapura, dan responden telah mengikat dua perjanjian berkenaan dengan transaksi pertukaran asing di mana perayu akan
G menolong responden dalam menjalani urusan mereka yang telah dilaksanakan di Singapura, London dan New York. Perjanjian tersebut mengandungi fasal di mana pihak-pihak telah bersetuju supaya terikat oleh undang-undang Singapura dan tertakluk kepada mahkamahnya. Responden telah mendapatkan kebenaran mahkamah untuk
H mengeluar dan menyampaikan suatu notis writ di luar bidang kuasa dan mengata bahawa perayu telah secara fraud memungkiri kewajipan fidusiari terhadap mereka dengan memberikan mereka maklumat yang palsu dan mengelirukan dan menuntut untuk ganti rugi khas sebanyak US$10.55 juta, ganti rugi am sebanyak US$10 juta dan kos. Perayu telah memohon untuk melepaskan perintah yang
I memberikan kebenaran untuk mengeluar dan menyampaikan notis writ di luar bidang kuasa dan untuk mengetepikan writ itu dan penyampaiannya atas alasan, antara lain, bahawa: (i) mahkamah Malysia tidak mempunyai bidang kuasa ke atas perkara itu kerana tort yang dikatakan itu telah dilakukan di luar bidang kuasa;

(ii) adalah nyata dipersetujui di dalam perjnajian tersebut bahawa semua pertikaian akan ditentukan mengikut undang-undang Singapura dan oleh mahkamahnya; (iii) Singapura merupakan forum yang betul kerana semua saksi datang dari negara itu atau negara lain dan bukan dari Malaysia. Permohonan itu telah ditolak (lihat [1994] 2 MLJ 687) dan perayu telah membuat rayuan.

Diputuskan, membenarkan rayuan itu:

(1) Hakim perbicaraan telah memutuskan dengan betul bahawa tort melakukan salah nyata fraud dan cuai apabila dibuat melalui telefon atau teleks dilakukan di tempat di mana perutusan itu diterima dan tindakan diambil terhadapnya, dan bukan di tempat dari mana ia dihantar. Oleh itu, Mahkamah Tinggi mempunyai bidang kuasa untuk mendengar tuntutan itu.

(2) Bagaimanapun, meskipun terdapat bidang kuasa itu, mengikut common law, mahkamah masih mempunyai budi bicara untuk memutuskan sama ada hendak mengendalikan kes itu atas doktrin forum non conveniens, yang bermakna kesesuaian atau kewajaran bidang kuasa yang relevan dan bukan kemudahan.

(3) Di mana seorang defendan memohon untuk penggantungan prosiding, beliau mesti memuaskan hati mahkamah bahawa sesuatu forum lain lebih sesuai, tetapi di mana seorang plaintif memohon untuk kebenaran mengeluar dan menyampaikan suatu notis writ di luar bidang kuasa di bawah A 11 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT itu'), jadi plaintif mesti memuaskan hati mahkamah bahawa mahkamah di Malaysia adalah forum yang paling sesuai untuk membicarakan tindakan itu. Di dalam kes ini, beban terletak di atas responden untuk menunjukkan bahawa Malaysia merupakan forum yang paling sesuai. Bagaimanapun, adalah wajib untuk mahkamah mempertimbangkan sama ada tidak adil kepada plaintif jika beliau dihadkan kepada remedi di tempat lain.

(4) Mahkamah di Malaysia tidak dihalang daripada menggunakan budi bicaranya sama ada hendak mendengar kes itu, semata-matanya kerana terdapat fasal bidang kuasa asing yang menetapkan undang-undang dan mahkamah Singapura. Bagaimanapun, fasal tersebut berkesan untuk menghalang hujah responden bahawa mahkamah di Malaysia merupakan forum yang paling sesuai. Lebih-lebih lagi, kesemua sekuriti responden telah disimpan dengan perayu di Singapura dan London dan saksi utama bagi pihak perayu bermastautin di luar Malaysia. Oleh itu, responden telah gagal memuaskan hati mahkamah bahawa ia adalah forum yang paling sesuai untuk membicarakan tindakan itu.

Obiter:

Jika terdapat hanya fasal pemilihan undang-undang Singapura dan tidak ada pemilihan mahkamah Singapura, itu tidak akan merupakan suatu penyerahan kepada bidang kuasa mahkamah di Singapura.]

A **Notes**

For cases on jurisdiction, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 2092–2255; [1993] Mallal's Digest 222–229.

Cases referred to

B *Diamond v Bank of London and Montreal Ltd* [1979] QB 333; [1979] 1 All ER 561; [1979] 2 WLR 228 (folld)

Globus Shipping and Trading Co (Pte) Ltd v Taiping Textiles Bhd [1976] 2 MLJ 154 (folld)

Sim v F Robinow (1892) 19 R (Ct of Sess) 665 (refd)

C *Spiliada Maritime Corp v Cansulax Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 (folld)

Legislation referred to

Courts of Judicature Act 1964

D Rules of the High Court 1980 O 11 r 1

K Anantham (*CL Wong* with him) (*Skrine & Co*) for the appellant.
Chin Yew Meng (Allen & Gledhill) for the respondents.

Peh Swee Chin FCJ (delivering the grounds of judgment of the court):

E At the conclusion of the hearing of arguments, we have allowed the appeal herein, indicating that we would give our reasons in writing, and now we hereby do so.

The appellant/defendant, a foreign bank, has been carrying on business, at all material times, in the Republic of Singapore (hereafter

F called 'the foreign bank') and the respondents/plaintiffs were customers of the foreign bank in connection with foreign exchange dealings or transactions (hereafter called 'the bank customers').

To summarize, the statement of claim of the bank customers in the notice of writ of summons, alleged that the bank customers were hopeful

G that the foreign bank would assist them in their foreign exchange transactions; the foreign bank being also a foreign exchange dealer allegedly promised to do everything possible to so assist the bank customers in such transactions; both parties then entered into two agreements both dated 20 October 1992 and under the respective titles of 'Foreign Exchange, Metal and Option Agreement' and 'Securities Services Agreement'.

H The statement of claim alleged further in effect that the bank customers gave instructions from Kuala Lumpur for foreign exchange dealings which were transacted by the foreign bank in Singapore, London and New York.

The statement of claim further alleged that for a period of 20 days, 127 foreign exchange transactions were carried out in London, New York

I and Singapore for a total value of USS400m, and further that the foreign bank had acted in 'fraudulent breach of a fiduciary duty' owed to them, with particulars of fraud being appended to the statement of claim. It was alleged, with particulars given, that the foreign bank had given false and misleading information to the bank customers, obtaining a profit for itself

and passing the loss to the bank customers. The bank customers, therefore, claimed special damages of US$10.55m, general damages of US$10m and costs.

It will be noticed that the action was based in tort and not contract.

An ex parte summons-in-chambers dated 25 August 1993 was filed together with the said notice of writ of summons bearing the same date. The said summons-in-chambers was fixed for hearing also on the same date with the order being made ex parte on the same date in terms thereon by a learned deputy registrar, granting leave to issue and to serve the said notice of writ of summons out of jurisdiction on the foreign bank.

The foreign bank filed a conditional appearance and a further application dated 24 December 1993 for the order of the learned deputy registrar dated 25 August 1993 above-mentioned to be set aside and for a further order that the said notice of writ of summons itself and the service of the same to be also set aside with costs.

The learned judge who, on the whole gave an elaborate and well-reasoned judgment (except on one point), dismissed the aforesaid application of the foreign bank, and from such dismissal, the foreign bank had appealed to us. [See [1994] 2 MLJ 687.]

Two points clearly emerged as issues in this matter, viz, first, whether our High Court had jurisdiction to hear the action thus filed, and secondly whether our High Court was or was not a forum non conveniens but arguments were addressed to court without seeming to make a clear distinction between the two issues, causing perhaps a good reasoning on the part of the learned judge on the question of jurisdiction but a rather inadequate one on the other point of forum non conveniens.

To summarize, it was argued to the effect for the foreign bank that first, that the subject matter of the claim was in contract. Secondly, all the foreign exchange transactions and other things took place outside Malaysia, except for the instructions and information from the foreign bank to the bank customers, which were received by the bank customers in Kuala Lumpur and acted on by them in Kuala Lumpur. Thirdly, both agreements had provided for all disputes between the parties to be adjudicated in Singapore.

On the other hand, it was argued, first, for the bank customers that the foreign bank's arguments were outside the ambit of its own application to set aside, etc, which was not an application to stay proceedings on the ground of forum non conveniens. Secondly, it was argued that the only question for the High Court to decide was whether it had jurisdiction and the foreign bank's argument had strayed outside by saying that the claim was based on contract and not in tort. Thirdly, the bank customers had received the fraudulent information or misrepresentations in Kuala Lumpur. Fourthly, that the respective clauses in the two agreements aforesaid about the law and jurisdiction in connection with disputes were not relevant, as the claim was in tort.

The learned judge relied on, inter alia, the case of *Diamond v Bank of London and Montreal Ltd* [1979] QB 333; [1979] 1 All ER 561; [1979]

2 WLR 228, the correctness of which was conceded by the learned counsel for the foreign bank; in that case, it was held that the tort of fraudulent and negligent misrepresentation when made by the telephone or telex was committed at the place where the message was received and acted on, and not the place from which it was sent. His Lordship held for this reason and others, that the High Court had jurisdiction in this matter to entertain the claim in this case.

We are in agreement with the view of the learned judge about the point of jurisdiction. We parted company only with the learned judge on the point of forum non conveniens. We set out below the relevant passage from the relevant grounds of judgment ([1994] 2 MLJ 687 at p 692):

> As regards the forum non conveniens, which plea is more frequently stated than sustained, it is my view that this issue cannot be entertained as it is not really in dispute that the tort had been committed in Malaysia. This finding in effect overrides the other considerations, namely, that the two agreements were executed in Singapore, that there were specific clauses on governing law and jurisdiction in those agreements, that the transactions had been concluded outside Malaysia, whether there is a good arguable case, and the question of expenses, as either party would incur more expenses if the trial is held in the country of the other party. As for the witnesses, if they are from neither country, the cost of bringing them to either Singapore or Malaysia would be quite the same.
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> In the circumstances, it was my finding that there was no merit to this application and it was accordingly dismissed with costs.

We further set out below the relevant clauses of choice of law and jurisdiction, being cl 19 of the 'Foreign Exchange, Metal and Option Trading Agreement' and cl 26 of the 'Securities Services Agreement':

> 19 Governing law and jurisdiction
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> This agreement and each contract shall be governed by and construed in accordance with the laws of Singapore and the customer hereby irrevocably submits to the non-exclusive jurisdiction of the Singapore courts, provided that such jurisdiction, at the sole option of the bank, shall not be exclusive. The customer waives any objection on the grounds of venue or forum non conveniens or any similar grounds and agrees that any writ, summons, order, judgment or other document shall be deemed duly and sufficiently served if addressed to the customer and left at or sent by post to the address of the customer last known to the bank.
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> 26 Governing law and jurisdiction
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> These conditions shall be governed by and construed in accordance with the laws of Singapore and the parties, for the purposes of s 3(3) of the Judicial Committee Act, hereby consent to be bound by the decision of the Judicial Committee of the Privy Council on any appeal thereto in respect of any dispute hereunder. The customer hereby irrevocably submits to the jurisdiction of the Singapore courts, provided that such jurisdiction, at the sole option of the bank, shall not be exclusive. The customer agrees that any writ, summons, order, judgment or other document shall be deemed duly and sufficiently served if addressed to

the customer and left at or sent by post to the address of the customer last known to the bank.

There was some failure to bear in mind sufficiently the distinction between the point of jurisdiction and that of forum non conveniens and we need to give our reasons for saying so. It is far better if we give our view of the nature of jurisdiction further.

In a case like the present one, involving some foreign elements, the question that normally first of all arises, is whether our courts have jurisdiction, ie power to deal with the case.

At common law, it would mean that a Malaysian court would have jurisdiction over a foreign defendant, if he is present in Malaysia. If he is not present in Malaysia, the Malaysian court would still have jurisdiction, if the foreign defendant has submitted to jurisdiction, ie he has submitted to being sued in Malaysia.

If neither such a defendant can be served in this country, because he is not present here nor has he submitted to jurisdiction, then the Malaysian court can assume, statutorily, such jurisdiction over the foreign defendant under O 11 r 1 of the Rules of the High Court 1980 (hereafter called 'the RHC'), as the conferment of such jurisdiction is implicit in connection with the granting of leave by the High Court for service out of jurisdiction, etc. There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964, etc, for source or origin of such statutory jurisdiction.

Further for the purpose of the instant case, O 11 r 1(1)h of the RHC expressly and further provides for the service out of jurisdiction 'if the action begun by the writ is founded on a tort committed within the jurisdiction'.

To continue with our view, it is most important to bear in mind another vital principle, that, even if there is such jurisdiction to deal with the case, at common law, a Malaysian court has still the discretion to decide whether to deal with it on the doctrine of forum non conveniens. If the court exercises its discretion accordingly, eg not to deal with the case, then as the case may be, it can either stay the proceedings against the foreign defendant or refuse to grant leave to issue and serve out of jurisdiction such a notice of writ of summons, or permit an application to set aside such leave when leave has already been granted in the absence of the foreign defendant in an ex parte application for such leave earlier.

In the instant appeal, the statement of claim was cast in tort. The foreign bank was not present within the jurisdiction, neither had it submitted to the jurisdiction of our High Court. A trial of merits of the case at this stage was naturally out of question so long as the statement of claim disclosed a reasonable cause of action in tort. Further, the necessary application for leave to issue and serve out of jurisdiction the notice of writ of summons was filed with a supporting affidavit verifying the said tort of fraud and deceit as stated in the statement of claim. It was plain from a reading of the statement of claim that the draftsman of the statement of claim must have taken great pains to ensure that it would not be read to give any facade of an action in contract.

A We agreed, therefore, with the learned judge that the High Court had jurisdiction in the matter for the reasons given.

As indicated, having such jurisdiction was not the end of the matter; the foreign bank applied to set aside the leave granted ex parte earlier to issue and serve the writ of summons out of jurisdiction. The High Court B would have to consider, next, to exercise its discretion on the doctrine of forum non conveniens as to whether to allow or not, the application of the foreign bank, in this case, to set aside the leave to issue and serve out of jurisdiction on the foreign bank granted earlier under O 11 r 1 of the RHC to the bank customers.

C The doctrine of forum non conveniens appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Cansulax Ltd (The Spiliada)* [1987] AC 460; [1986] 3 All ER 843; [1986] 3 WLR 972 after a series of decisions, as described and set out so well in that very interesting and readable joint article by RH Hickling and Wu Min Aun, 'Stay of Actions and Forum D Non Conveniens' [1994] 3 MLJ xcvii.

The main judgment in *The Spiliada* was delivered by Lord Goff, who adopted the dictum of Lord Kinnear in *Sim v F Robinow* (1892) 19 R (Ct of Sess) 665 at p 668 being the fundamental principle in regard to this doctrine, ie that 'there is some other tribunal, having competent jurisdiction, E in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'. Lord Goff cautioned that the word 'conveniens' in forum non conveniens meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

F In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the court that 'some other forum is more appropriate' per Lord Templeman in *The Spiliada*. Where, on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O 11 r 1 of the RHC is involved, then according to the reasoning of G Lord Templeman, the plaintiff (not the defendant, be it noted), would have to satisfy a Malaysian court that, by comparison, that Malaysian court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case, the burden lay on the bank customers, the plaintiffs, to satisfy the High Court below that Malaysia was the most H appropriate forum.

Having regard to the reasoning of the learned Law Lords in *The Spiliada* and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction I under O 11 r 1 of RHC, or for setting aside such leave, it will be obligatory for a Malaysian court to consider in any event, a most important factor, ie whether 'it would be unjust to the plaintiff to confine him to remedies elsewhere'. It is indispensable when a Malaysian court considers all cases in connection with forum non conveniens.

The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualize a large number of factors which overlap with one another.

We considered the relevant factors in this instant appeal. A very glaring factor in the instant appeal was the foreign jurisdiction clauses in both the said agreements as set out above by which the bank customers had chosen Singapore courts for the litigation, ie expressly, in other words, the bank customers had submitted to the jurisdiction of the chosen Singapore courts; and further, both parties had chosen Singapore law as the law of their choice for the litigation, prospective or otherwise.

It would be clear that, notwithstanding such clauses, a Malaysian court, ie High Court below, could not be precluded simpliciter thereby from exercising the discretion, according to the doctrine of forum non conveniens, as to whether to hear the instant case or not, please see the Federal Court case of *Globus Shipping and Trading Co (Pte) Ltd v Taiping Textiles Bhd* [1976] 2 MLJ 154. That said, such clauses would in any event, in some significant way, militate against any argument for the bank customers, ie the plaintiffs, that the Malaysian court was the most appropriate forum. It is desirable, in passing, to point out that had there been no choice of the Singapore courts in the said clauses, but only the choice of Singapore law, such choice of Singapore law agreed to by both parties would not have amounted to a submission to the jurisdiction of the Singapore courts.

Significantly, in a similar vein, except for the fact that the alleged fraudulent and misleading information or instructions from the foreign bank to the bank customers were received by the bank customers in Kuala Lumpur, all 127 foreign exchange transactions had taken place outside Malaysia, in London, New York and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London. The bank customers who were husband and wife, were residents in Malaysia; but the main protagonists from the foreign bank's camp were residents outside Malaysia, either in London, or Singapore. There were no peculiar difficulties which the bank customers would face apart from the inconvenience and expenses in crossing the causeway to Singapore which was more suitable as a forum. The bank customers, as plaintiffs, had plainly failed to satisfy the court that the Malaysian court was the most appropriate forum to try the action which they launched.

We therefore allowed the appeal with costs here and below with the deposit in court to be refunded to the appellant. For the avoidance of doubt, it would mean that an order in terms of the appellant's summons-in-chambers herein dated 24 December 1993 would be made consequentially.

Appeal allowed.

Reported by Prof Ahmad Ibrahim